



Decision Notice 210/2024

Alleged complaints

Applicant: The Applicant

Authority: South Lanarkshire Council

Case Ref: 202200480

Summary

The Applicant asked the Authority for information relating to alleged complaints made about him by a specified person. The Authority, after initially refusing to provide any information on the basis that the information requested was third-party personal information, refused to confirm or deny whether it held any information falling within the scope of the Applicant's request, arguing that if the information were held it would constitute personal data.

The Commissioner investigated and found that having already confirmed that it held information falling within the scope of the Applicant's request, the Authority was not entitled to refuse to confirm or deny whether it held the information covered by the request.

He required the Authority to issue a new review response.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(a) and 2(e)(ii) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 38(1)(a), (b), (2A)(a), (5) (definitions of "data protection principles", "data subject", "personal data" and "processing", and "the UK GDPR") and (5A) (Personal information); 47(1) and (2) (Application for decision by Commissioner)

United Kingdom General Data Protection Regulation (the UK GDPR) articles 4(1) and (11) (Definitions); 15(1) (Right of access by the data subject)

Data Protection Act 2018 (the DPA 2018) sections 3(2), (3), (5) and (14) (Terms relating to the processing of personal data).

Background

1. On 27 January 2022, the Applicant made a request for information to the Authority. He asked for information about any claims of racism made about him, by his neighbour [at a specified address].
2. The Authority responded on 15 February 2022. It refused the Applicant's request as it considered that the requested information was exempt from disclosure under section 38(1)(b) of FOISA, as the information was personal information.
3. On 16 February 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision because he did not agree with the application of the exemption and believed that the information should be provided to him.
4. The Authority notified the Applicant of the outcome of its review on 16 March 2022. The Authority substituted a different decision and stated that it was no longer relying on section 38(1)(b) of FOISA. It was instead applying section 18(1) of FOISA, to neither confirm nor deny whether it held information falling within the scope of the Applicant's request. The Authority informed the Applicant that if it did hold the information, it would be exempt from disclosure under section 38(1)(a) of FOISA.
5. On 18 March 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he did not agree with the application of section 18(1) or section 38(1)(a) of FOISA.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 3 May 2022, the Authority was notified in writing that the Applicant had made a valid application, and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to its reasons for relying on section 18(1) of FOISA, in conjunction with section 38(1)(a).
9. The Authority provided the Commissioner with its submissions.
10. The Applicant was also provided with the opportunity to submit any further comments in addition to those made in his application as to why it was in the public interest for the Authority to confirm or deny whether the requested information was held, which he did.

Commissioner's analysis and findings

11. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.
12. It may be instructive to set out the circumstances of this case.

13. The Applicant made an information request to the Authority seeking any claims of racism made about him by his neighbour [at a specified address]. The request included the following:
 - the Applicant wanted to make an information request to the Authority about any claims of racism made against him by his next-door neighbour [at a specified address]
 - the request was described as “a last resort”, as the Applicant was considering specified legal steps which he described to the Authority
 - the Applicant stated that he “knew” that his neighbour had made similar claims to employees of the Authority [again the Applicant specified the details]
 - the Applicant suspected that his neighbour had made similar claims about him
 - the Applicant acknowledged that if such claims were held by the Authority, he may not get access to them but that he would wish confirmation of the allegations
14. The Applicant had been the subject of a recent claim of this specified type of anti-social behaviour. The Authority had investigated this complaint and had decided that there was no evidence of the allegation. The Applicant was informed of the complaint, as required by the Authority’s procedure, and the final outcome. At no time was the identity of the person who had complained against the Applicant divulged by the Authority to the Applicant.
15. The Applicant subsequently made a subject access request (SAR) to the Authority and, in line with the UK GDPR and the Data Protection Act 2018, he obtained his personal data. In responding to the SAR, the Authority withheld third party data including that of the identity of the person initiating the complaint.
16. The Applicant was therefore aware of a complaint about him - and its nature - and therefore might have suspicions about the identity of who complained about him. (The Authority’s procedure acknowledged the inevitable limitations in maintaining anonymity of a complainer).
17. It is within this context that the Commissioner must assess whether the Authority complied with Part 1 of FOISA by its refusal (at review) to confirm or deny whether it held any information about any claims of racism that had been made about him by the specified third party (the Applicant’s neighbour). It is also important that the Commissioner is clear that he is assessing the Authority’s compliance with Part 1 of FOISA as at the time of the response to the Applicant’s requirement for review.

Section 18(1) – “neither confirm nor deny”

18. In response to the Applicant’s requirement for review, the Authority refused to confirm or deny whether it held any information falling within the scope of the Applicant’s request.
19. Section 18(1) of FOISA allows public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - A request has been made to the authority for information, which may or may not be held by it; and
 - If the information existed and were held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and

- The authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
20. Generally, where section 18(1) is under consideration, the Commissioner must ensure that his decision does not confirm one way or the other whether the information requested actually exists or is held by the authority. This means that he will be unable to comment in any detail on the Authority's reliance on any other exemptions referred to, or on other matters that could have the effect of indicating whether or not the information existed or was held by the authority.
 21. The Authority submitted that, if it held any information falling within the scope of the Applicant's request, it would be exempt from disclosure under section 38(1)(a) of FOISA.
 22. In this case, however, the Authority initially responded to the Applicant's request by informing him that it had located all of the information that he had requested, but that it was exempt from disclosure by virtue of section 38(1)(b).
 23. In his submissions, the Applicant's view was that, as the Authority had already confirmed that it held information falling within the scope of his request in its initial response, he did not see how section 18 of FOISA could then be engaged.
 24. In its submissions to the Commissioner, the Authority explained that its Review Panel had considered the matter anew when coming to its decision. Practically, however, there are limits to how far this can work in relation to the application of section 18, once the public authority has confirmed that the information exists and is held.
 25. The Commissioner must consider whether, in its response to the Applicant's request, the Authority did confirm that relevant information was held, as he does not accept that an authority can confirm to a requester that the information is held and then subsequently revert to a position where it refuses to confirm or deny the existence of that same information. To do so would make no sense and, in the Commissioner's view, would bring into disrepute a provision designed for a very serious purpose.
 26. The Commissioner has taken account of all of the relevant submissions received from both parties. In his view, given the actions of the Authority in its initial response to the Applicant, where it confirmed that it held information falling within the scope of his request (which appears to have been a considered, conscious decision), there would appear to have been no basis for subsequently refusing to confirm or deny whether the information existed and was held.
 27. On balance, therefore, the Commissioner finds that the Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether the information existed.
 28. The Commissioner requires the Authority to issue the Applicant with a revised review outcome, otherwise than in terms of section 18(1) of FOISA. He requires the Authority to confirm to the Applicant whether the information requested existed and was held by it when it received the request, and to issue a fresh review in terms of section 21(4)(b) of FOISA.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

He finds that the Authority was not entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether it held the information requested, or whether that information existed. The Commissioner therefore requires the Authority to provide the Applicant with a fresh review outcome (in terms of section 21(4)), otherwise in terms of section 18 of FOISA by 15 November 2024.

Appeal

Should either the Applicant or the Authority wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

Euan McCulloch
Head of Enforcement

1 October 2024